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Why Kentucky Should Adopt the ABA's Model Rules of Professional Conduct

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Why Kentucky Should Adopt the ABA's Model Rules of Professional Conduct

BY EUGENE R. GAETKE*

Author's Note: The Author was honored in 1985 to be named the first recipient of the W.L. Matthews Professorship in Law at the University of Kentucky College of Law. The award is a memorial to the late former dean and long-time faculty member of that college, W.L. Matthews, Jr. This Article is offered as a further tribute to the memory of Dean Matthews and as a challenge to future recipients of this prestigious honor to produce during their year of being so distinguished an essay or other work bearing upon a current legal topic important to the state of Kentucky or the nation for publication in the Kentucky Law Journal.

The Author cannot be sure that the contents of this Article would have been agreeable to Dean Matthews, but he is certain that the airing of legal issues critical to the people of Kentucky and of the nation in the Kentucky Law Journal in his memory would have pleased him greatly.

INTRODUCTION

In 1983, after six years of drafting and lively debate, the American Bar Association (ABA) adopted the Model Rules of

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Professional Conduct (Model Rules)¹ as its most recent statement of the ethical norms of the legal profession.² Shortly thereafter the ABA forwarded the rules to the states for consideration and possible adoption as binding ethical principles. As of this writing, a number of states have adopted the Model Rules, in full or in substantial form,³ and several more have proposals for such adoption pending before their supreme courts.⁴

¹ The American Bar Association's House of Delegates adopted the Model Rules of Professional Conduct (Model Rules) on August 2, 1983. G. HAZARD & W. HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* xxxi (1985). The rules were the product of the Commission on Evaluation of Professional Standards, known informally as the Kutak Commission in honor of its first chair, the late Robert J. Kutak. *Id.* at xxx. The Commission presented earlier drafts to the House of Delegates for comment in 1980, 1981, and 1982. *Id.* at xxx-xxxi.

² The Model Rules constitute the ABA's third effort at codifying the legal profession's ethical obligations. The ABA adopted the first effort, known as the Canons of Professional Ethics, in 1908. The Code of Professional Responsibility (Code) replaced the Canons in 1969 upon adoption by the ABA. The ABA intends the Model Rules to replace the Code. For a brief discussion of the ABA's role in the promulgation of ethical codes, see *id.* at xxix-xxxi.

³ As this Article goes to press, ten states have adopted versions of the Model Rules: Arizona, Arkansas, Delaware, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, and Washington. See 2 *Lawyers' Man. Prof. Conduct* (ABA/ BNA) No. 1, at 14-15 (Feb. 5, 1986) (Nevada and New Hampshire); 1 *Lawyers' Man. Prof. Conduct* (ABA/BNA) No. 52, at 1126 (Jan. 8, 1986) (Arkansas); *id.* No. 44, at 961-63 (Sep. 18, 1985) (Delaware and Washington); *id.* No. 42, at 924 (Aug. 21, 1985) (Missouri); *id.* No. 39, at 855-56 (July 10, 1985) (Minnesota and Montana); *id.* No. 19, at 445 (Oct. 3, 1984) (Arizona); *id.* No. 14, at 334 (July 25, 1984) (New Jersey). The Model Rules have also been adopted by the U.S. Claims Court. *Id.* No. 10, at 240 (May 30, 1984).

North Carolina has adopted a version that combines several aspects of both the Code and the Model Rules. *Id.* No. 47, at 1026 (Oct. 30, 1985). In addition, the Pennsylvania Supreme Court has announced its intention to adopt the Model Rules. *Id.* No. 1, at 17 (Jan. 25, 1984).

To date, only Virginia has formally rejected the Model Rules. See Note, *Confidentiality and Conflicts of Interest: New Guidelines for Virginia Attorneys Under the Revised Virginia Code of Professional Responsibility*, 41 WASH. & LEE L. REV. 1577, 1577-78 (1984).

⁴ Recommendations to adopt the Model Rules or versions of them are before the highest courts of twelve states. See 2 *Lawyers' Man. Prof. Conduct* (ABA/BNA) No. 2, at 37-38 (Feb. 19, 1986) (Idaho and Wyoming); 1 *Lawyers' Man. Prof. Conduct* (ABA/BNA) No. 53, at 1142-43 (Jan. 22, 1986) (Louisiana and West Virginia); *id.* No. 49, at 1065-66 (Nov. 27, 1985) (Connecticut and Indiana); *id.* No. 46, at 1006-07 (Oct. 16, 1985) (South Carolina); *id.* No. 40, at 881 (July 24, 1985) (Utah); *id.* No. 37, at 812 (June 12, 1985) (New Mexico); *id.* No. 28, at 630-31 (Feb. 6, 1985) (Wisconsin); *id.* No. 23, at 534-35 (Nov. 28, 1984) (Maryland); *id.* No. 3, at 70 (Feb. 22, 1984) (Michigan).

In Illinois, the state bar has recommended the adoption of the Model Rules,

The Kentucky Supreme Court presently awaits the state bar association's recommendation regarding the Model Rules' adoption.⁵ Meanwhile, the currently applicable body of law regarding legal ethics in Kentucky is the ABA's earlier statement of professional norms, the Code of Professional Responsibility (Code).⁶ The issues that the state bar association currently faces and that the Kentucky Supreme Court ultimately must decide are whether the present Code warrants revision or abandonment and, if the latter, whether the Model Rules or some variant of them should be the replacement.⁷ It is, therefore, an opportune time to assess what is to be gained by adopting the Model Rules and what is to be lost in failing to do so. This Article attempts that assessment. The Author believes that the adoption of the Model Rules in Kentucky is critical. Those rules constitute a considerable substantive improvement over the Code.⁸ Furthermore, certain peculiarities of the regulation of professional conduct in Kentucky cause the people and lawyers of the state to stand to benefit more than those of most other states by the adoption of the Model Rules.⁹ In fact, the Author believes that the Model Rules' adoption in Kentucky would constitute one large step in a much needed reform of the state's present lawyer disciplinary process.¹⁰

although not their form, to that state's supreme court's Committee on Professional Responsibility, which will make a final recommendation to the court. *Id.* No. 40, at 881 (July 24, 1985). Similarly, a committee of the Florida Bar association has urged the organization to recommend judicial adoption of the Model Rules. *Id.* No. 8, at 191-92 (May 2, 1984) (Florida).

The state bars of New York, Oregon, and Vermont, however, have recommended against the adoption of the Model Rules. *See id.* No. 48, at 1047-48 (Nov. 13, 1985) (New York, Oregon); *id.* No. 39, at 856 (July 10, 1985) (Vermont).

⁵ A special committee of the Kentucky Bar Association has labored since late 1984 in considering the adoption of the Model Rules. That committee has recommended that the association's Board of Governors forward the Model Rules, with some amendments, to the Kentucky Supreme Court for adoption. *See REPORT OF THE SPECIAL COMMITTEE TO CONSIDER ADOPTION OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT OR TO CONSIDER REVISIONS OF THE 1969 CODE 1* (Mar. 14, 1986) [hereinafter cited as REPORT].

⁶ The Kentucky Supreme Court adopted the Code as binding disciplinary law by its order of November 11, 1969. KY. SUP. CT. R. 3.130 (1969) [hereinafter cited as KSCR]. For further discussion of the Court's peculiar adoption of the Code, see text accompanying notes 44-48 *infra*.

⁷ *See* REPORT, *supra* note 5, at 1.

⁸ *See* text accompanying notes 13-43 *infra*.

⁹ *See* text accompanying notes 44-48 *infra*.

¹⁰ *See* text accompanying notes 49-57 *infra*.

I. THE MODEL RULES' SUBSTANTIVE ADVANTAGE OVER THE CODE

Much has already been written about the comparative merits of the Model Rules and the ABA's earlier effort at codifying the profession's ethical norms, the Code.¹¹ Indeed, the committee that drafted the Model Rules included in its report to the ABA's House of Delegates a comparison of the proposed rules to the existing Code provisions.¹² A detailed accounting of the substantive advantages of the Model Rules over the Code at this time, therefore, would be largely repetitive. Nevertheless, since the overriding concern in adopting any new body of law should be its improvement of the existing law, a summary of the advantages offered a state adopting the Model Rules is surely worthwhile. In the Author's opinion, the Model Rules are a considerable improvement over the Code, both in form and substance.

The form of the Code, quite frankly, never worked as its drafters intended. The Code was divided into three types of statements: Canons, Ethical Considerations (EC's), and Disciplinary Rules (DR's). The Canons were statements of "axiomatic norms"¹³ and served primarily as headings for the various organizational divisions within the document. The Ethical Considerations were intended to be "aspirational" statements of lawyers' ethical objectives but were not to be mandatory in character.¹⁴

¹¹ See, e.g., Abbott, *Proposed Changes in Rules Governing Professional Conduct in Kansas*, 54 J. KAN. BAR ASSN. 8 (Spring 1985); Denecke, *Complexities of Modern Practice Require Changes in Oregon Ethics Code*, 19 WILLAMETTE L. REV. 621 (1983); Riger, *The Model Rules and Corporate Practice—New Ethics for a Competitive Era*, 17 CONN. L. REV. 729 (1985); Rotunda, *The Notice of Withdrawal and the New Model Rules of Professional Conduct: Blowing the Whistle and Waving the Red Flag*, 63 ORE. L. REV. 455 (1984); Sutton, *How Vulnerable is the Code of Professional Responsibility?*, 57 N.C.L. REV. 497 (1978-79); Walter, *An Overview of the Model Rules of Professional Conduct*, 24 WASHBURN L.J. 443 (1985); Note, *Proposed Model Rule 1.6: Its Effect on a Lawyer's Moral and Ethical Decisions with Regard to Attorney-Client Confidentiality*, 35 BAYLOR L. REV. 561 (1983).

¹² G. HAZARD & W. HODES, *supra* note 1, at xxxi. The Code comparison may be found in T. MORGAN & R. ROTUNDA, 1985 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY, 67-188 (1985).

¹³ MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preamble and Preliminary Statement (1978) [hereinafter cited as CODE].

¹⁴ *Id.*

The drafters intended the Disciplinary Rules, on the other hand, to be mandatory and state the minimum level of acceptable conduct for lawyers.¹⁵ Unfortunately, the tripartite format never succeeded in practice.¹⁶ A number of courts,¹⁷ including Kentucky's,¹⁸ have blurred the distinction between Disciplinary Rules and Ethical Considerations by imposing discipline upon lawyers violating only the latter. Similarly, some courts have utilized mere Canons in a manner inconsistent with their purpose.¹⁹ Furthermore, conscientious lawyers looking hopefully to the aspirational Ethical Considerations for enlightenment as to the

¹⁵ *Id.*

¹⁶ See Denecke, *supra* note 11, at 629-31; Sutton, *supra* note 11, at 505-09, 514-16.

¹⁷ See, e.g., *In re Disciplinary Action Against Prueter*, 359 N.W.2d 613 (Minn. 1984) (attorney found guilty of violating Ethical Consideration (EC) 5-5); *Committee on Professional Ethics & Conduct v. Behnke*, 276 N.W.2d 838 (Iowa) (court held attorney violated EC 5-5), *appeal dismissed*, 444 U.S. 805 (1979); *Florida Bar v. Dawson*, 318 So. 2d 385 (Fla.) (upholding referee's finding that attorney violated EC 5-8), *cert. denied*, 423 U.S. 995 (1975). See also Note, *Lawyer Disciplinary Standards: Broad v. Narrow Proscriptions*, 65 IOWA L. REV. 1386, 1387-88 (1979-80).

¹⁸ See *Kentucky Bar Ass'n v. DeCamillis*, 547 S.W.2d 446, 447-48 (Ky. 1977).

¹⁹ Sutton, *supra* note 11, at 514. In Kentucky, for example, mere Canons have occasionally been relied upon as the sole legal reasons for finding certain conduct inappropriate. See *In re Advisory Opinion of Ky. Bar Ass'n*, 613 S.W.2d 416 (Ky. 1981). At issue there was the validity of the bar association's ethical opinion that prohibited a lawyer from concurrently representing the Fraternal Order of Police and practicing criminal law in the same jurisdiction. The Court, in upholding the opinion, feared that such representation would impinge upon the lawyer's ability under Canon 7 to represent zealously criminal defendants whose defense might require vigorous cross-examination of police officers. The Court equally strongly emphasized the lawyer's duty under Canon 9 to avoid conduct that might appear inappropriate to the public. *Id.* Oddly, no mention was made of Canon 5 ("A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client") in general or Disciplinary Rule (DR) 5-105(A)-(C) (which prohibits certain simultaneous representation due to conflicts between clients) in particular.

An examination of Canon 9 perhaps best illustrates the difficulty inherent in utilizing Canons as the basis for disciplinary cases. It provides that "[A] Lawyer Should Avoid Even the Appearance of Impropriety." Note, however, that no Disciplinary Rule requires the avoidance of the mere appearance of impropriety. Although DR 9-101(A)'s heading reads, "Avoiding Even the Appearance of Impropriety," the rule itself defines specific prohibited acts that might lead to such appearances. Thus, utilizing Canon 9 as the basis for a disciplinary decision is to elevate the broad axiomatic heading of the Code's ninth division to the level of a mandatory rule of minimum conduct. This clearly was not the drafters' intent in creating the Canons. See CODE Preamble and Preliminary Statement.

norms of the profession have frequently found only overly simplistic generalities providing no guidance whatsoever.²⁰

The ABA has proposed the Model Rules in a form more suitable to their regulatory and advisory purpose. The format is similar to that used in the Uniform Commercial Code and the American Law Institute's various restatements. That is, the rule is stated, followed by an official comment shedding light upon the purpose of the rule, its interpretation, and application. The form is both workable and familiar to lawyers, the regulated parties. It is also more useful and understandable to the general public.

More important than its improved form, however, is the substantive improvement in the regulation of legal ethics offered by the Model Rules. The Code, quite simply, was drafted for an earlier era,²¹ described by one critic as "downstate Illinois in the 1860s."²² For example, the Code envisions law practice primarily in a simplistic litigative setting²³ and provides little guidance for lawyers engaged in counseling clients, mediating disputes, and rendering opinions to third parties.²⁴ The Model Rules, in

²⁰ See, A. KAUFMAN, PROBLEMS IN PROFESSIONAL RESPONSIBILITY 30-31 (1976); Sutton, *supra* note 11, at 516.

²¹ See Denecke, *supra* note 11, at 621-22, 639. The same criticism had been levied at the Code's predecessor, the Canons of Professional Ethics. See Stone, *The Public Influence of the Bar*, 48 HARV. L. REV. 1, 10 (1934).

²² G. HAZARD, ETHICS IN THE PRACTICE OF LAW 6-7 (1978) (quoting an attendee of conference at Seven Springs Center established by Yale University).

²³ R. ARONSON, J. DEVINE & W. FISCH, PROBLEMS, CASES AND MATERIALS IN PROFESSIONAL RESPONSIBILITY, 511 (1985); G. HAZARD, *supra* note 22, at 7. Robert J. Kutak, the chair of the committee that drafted the Model Rules, quoted a practicing attorney as having said that using the Code "as a guide to the practice of law is like using a valentine as a model for open heart surgery." Denecke, *supra* note 11, at 622 (quoting address by Robert J. Kutak, Annual Orison S. Marden Memorial Lecture to the Association of the Bar of New York City (Jan. 13, 1983)).

²⁴ The Code expressly distinguishes between the lawyer as advocate and as advisor primarily in the Ethical Considerations. See, e.g., CODE EC 5-15 (representation of multiple clients in litigation and other instances); *id.* EC 7-3 (distinction between advocate and advisor in representing a client zealously). A few Disciplinary Rules are expressly limited to the litigation context, thus implicitly suggesting that others not so limited are broadly applicable to other law practice settings. See, e.g., CODE DR 5-101(B) (accepting employment in pending or contemplated litigation in which the lawyer ought to be called as a witness); *id.* DR 5-103(A) (acquiring a proprietary interest in the cause of action or subject matter of litigation); *id.* DR 7-103 (the role of the public prosecutor); *id.* DR 7-

contrast, expressly recognize the complexity of modern law practice and include specific provisions on the lawyer's role as an advisor,²⁵ intermediary,²⁶ and evaluator.²⁷ The Code's obsolescence is also exemplified by the numerous code provisions of questionable constitutionality after United States Supreme Court decisions since the Code's 1969 adoption.²⁸ The Model Rules generally recognize these developments²⁹ and expressly avoid con-

106 (trial conduct); *id.* DR 7-107 (trial publicity).

The lawyer as mediator also receives Code treatment in the Ethical Considerations. See CODE EC 5-20. The Code does not expressly treat the lawyer's role as provider of opinions for third party use.

²⁵ See MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 (1983) [hereinafter cited as MODEL RULES].

²⁶ See *id.* Rule 2.2.

²⁷ See *id.* Rule 2.3.

²⁸ Most notable in this regard, of course, is the field of advertising. The United States Supreme Court's decisions in *Bates v. State Bar of Ariz.*, 433 U.S. 350, *reh'g denied*, 434 U.S. 881 (1977), *In re R.M.J.*, 455 U.S. 191 (1982), and *Zauderer v. Office of the Disciplinary Counsel of the Supreme Court of Ohio*, 105 S. Ct. 2265 (1985), have greatly circumscribed the organized bar's ability to regulate constitutionally lawyer advertising that is not misleading or potentially misleading. Thus, the Code's approach to advertising embodied in DR 2-101(B) is likely unduly restrictive under the first amendment. Even the Kentucky Supreme Court's own rule on advertising, KSCR 3.135, may run afoul of the constitutional cases in this area. For example, KSCR 3.135(3)(j) prohibits the use of illustrations other than a recent photograph of the advertising lawyer and an "image of the scales of justice." In *Zauderer*, however, a nonmisleading drawing of an intrauterine device displayed in a lawyer's advertisement was held protected by the first amendment. 105 S. Ct. at 2280-81.

Other Supreme Court cases cast doubt upon the constitutional validity of the Code's broad prohibition of solicitation (DR 2-103, 2-104). See *In re Primus*, 436 U.S. 412 (1978); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, *reh'g denied*, 439 U.S. 883 (1978). The Code's constitutional ability to restrict certain group legal plans (DR 2-103(D)(4)) is also in doubt. See *United Transp. Union v. State Bar of Mich.*, 401 U.S. 576 (1971); *United Mine Workers of Am. v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967); *Brotherhood of R.R. Trainmen v. Virginia State Bar*, 377 U.S. 1, *reh'g denied*, 377 U.S. 960 (1964); *NAACP v. Button*, 371 U.S. 415 (1963).

²⁹ For example, consistent with the United States Supreme Court's developing case law under the first amendment, Model Rule 7.2 prohibits only false or misleading advertising. See cases cited *supra* note 28. The Model Rules contain no restrictions on group legal plans, so long as rules pertaining to advertising, solicitation, and professional independence are followed. See MODEL RULES Rules 5.4, 7.2(c), 7.3. Model Rule 7.3, relating to solicitation, attempts to focus on one distinction between the United States Supreme Court decisions in *Ohralik* and *In re Primus*. *Ohralik* upheld discipline for solicitation for pecuniary gain. *In re Primus* deemed protected by the first amendment solicitation for purposes of furthering political and social objectives. Model Rule 7.3 prohibits solicitation for pecuniary gain. It is not clear, however, that all such solicitation is outside the protection of the first amendment. The New York Court of Appeals found

flict with constitutional case law.³⁰ In several respects, therefore, the Model Rules offer a body of regulatory law that is more consistent with contemporary law practice and constitutional doctrine.

Compared to the Code, the Model Rules also offer improved treatment of some recurring, troublesome ethical areas. One notable example is the broad and diverse field of conflicts of interest. The Code's treatment of conflicts in Canon Five is both scant and inscrutable. There is no express Code treatment of the prevalent problem of subsequent representation (i.e., opposing former clients),³¹ and lawyers are left to infer what restrictions are suggested by distinct Code limitations on revealing confidences and secrets of clients,³² being loyal to clients,³³ and avoiding the appearance of impropriety.³⁴ The Model Rules, however, expressly treat the problem of subsequent representation in a way both functionally sound and consistent with the case law developed in the nondisciplinary context of disqualification motions.³⁵ Even the Code's express treatment of certain other con-

the critical distinction to be between nondeceptive written solicitation, which would be protected, and face-to-face solicitation, which would not be protected. *See* Committee on Professional Standards v. von Wiegen, 470 N.E.2d 838, 841 (N.Y. 1984), *cert. denied*, 105 S. Ct. 2701 (1985). *See also* *In re Appert*, 315 N.W.2d 204 (Minn. 1981) (discipline under Minnesota's CODE DR 2-101 and DR 2-103 held unconstitutional where applied to attorney using direct mailing to list of specific persons, not known to need legal services.). Thus, even Model Rule 7.3 may prove to be unconstitutionally broad.

The Kentucky Supreme Court has also extended first amendment protection to direct mail advertising, which may be viewed as a form of written solicitation since it is targeted to an audience suspected of needing legal services. *See* Kentucky Bar Ass'n v. Stuart, 568 S.W.2d 933 (Ky. 1978). It is not clear whether the Kentucky Supreme Court would extend that protection as far as the New York court, however, to situations involving direct mail advertising pertaining to litigation. *Cf.* Kentucky Bar Ass'n v. Stivers, 475 S.W.2d 900 (Ky. 1971), *cert. denied*, 406 U.S. 968 (1972) (lawyer disciplined for mail solicitation relative to litigation but facts arising prior to Kentucky's adoption of the Code).

³⁰ *See, e.g.*, MODEL RULES Rule 3.3, comment 12 (duty of lawyer to disclose client perjury "may be qualified by constitutional provisions for due process and the right to counsel in criminal cases").

³¹ *See* Denecke, *supra* note 11, at 637.

³² *See* CODE DR 4-101(B)-(C).

³³ *See id.* Canon 5.

³⁴ *See id.* Canon 9.

³⁵ *See* MODEL RULES Rule 1.9. Model Rule 1.9 focuses upon the substantial relationship between the former and present representations and the potential misuse of

flicts issues tends to leave the reader totally puzzled. For example, DR 5-105(C) permits a lawyer to represent conflicting interests simultaneously if the lawyer has the clients' informed consent but only if it is also "obvious" that he or she can adequately represent both. In the face of such a conflict, however, when, if ever, can adequate representation be "obvious"? That standard is both so strict and so vague as to leave a conscientious lawyer with no guidance at all. The Model Rules deal with the propriety of such simultaneous representation in terms of the lawyer's reasonable belief that the conflict will not adversely affect the attorney-client relationship with either client, a considerable improvement over the opaque standard of obviousness.

The Model Rules also expressly address the difficult problem of professional responsibility within the law firm setting. Provisions speak directly to the obligations of partners as well as supervisory³⁶ and subordinate³⁷ lawyers within a firm. Untreated by the Code, this matter surely presents a problem to every partner or associate having become aware of ethical transgressions by other lawyers within the law firm.

The Model Rules also discard some of the ethical restrictions contained in the Code that appear to serve only the interests of certain segments of the legal profession. For example, DR 2-107 prohibits lawyers not practicing within a law firm context from sharing fees unless the client consents, the fee division is proportional to "the services performed and responsibility assumed" by each lawyer, and the total fee is reasonable.³⁸ The provision restricts referral arrangements, therefore, unless the

confidential information imparted during the former representation. *Id.* Courts generally use this approach in determining when counsel appearing in civil litigation should be disqualified due to conflicts of interest resulting from prior representations. *See, e.g.,* LaSalle Nat'l Bank v. County of Lake, 703 F.2d 252, 255-56 (7th Cir. 1983) (firm representing plaintiff disqualified because defendant was former employer of an associate of the firm); General Electric Co. v. Valeron Corp., 608 F.2d 265, 267-68 (6th Cir. 1979), *cert. denied*, 445 U.S. 930 (1980) (attorney disqualified because substantial relationship shown between attorney's prior work for plaintiff, with receipt of confidential information, and current adverse litigation). The leading case in the development of the substantial relationship test in the disqualification context is T.C. Theatre Corp. v. Warner Brothers Pictures, Inc., 113 F. Supp. 265, 268-69 (S.D.N.Y. 1953).

³⁶ See MODEL RULES Rule 5.1.

³⁷ See MODEL RULES Rule 5.2.

³⁸ See CODE DR 2-107(A)(1)-(3).

referring lawyer performs services in the representation. If the referring lawyer remains responsible for the conduct of the lawyer to whom a matter is referred, however, it seems that such a referral arrangement is functionally indistinguishable from that regularly used within law firms. Clients frequently seek legal representation from a lawyer in a law firm and are then represented, with the client's consent, exclusively by another lawyer within the firm. By prohibiting similar arrangements between lawyers not working in law firm settings the Code favors one form of practice over another with no corresponding public benefit.³⁹

Additional examples of the Model Rules' improvement over the present Code in the substance of legal ethics regulation could be provided. This is not to suggest that the Model Rules are without problems. Commentators have roundly criticized the Model Rules on the one hand as too strict an incursion into the attorney-client relationship⁴⁰ and, on the other, as too protective of lawyers' interests at the expense of those of the general public.⁴¹ Several aspects of the Model Rules, most notably those dealing with the lawyer's obligations of confidentiality,⁴² have

³⁹ Compare MODEL RULES Rule 1.5(e) (allows division of fees, between lawyers who are not in the same firm, without regard to the services performed by each, if they share joint responsibility for the client's representation) with CODE DR 2-107(A)(1)-(3) (permits division of fees only in proportion to services rendered).

⁴⁰ Dissatisfaction with the proposed Model Rules and the existing Code caused a group of trial lawyers, comprising the Commission on Professional Responsibility under the auspices of the Roscoe Pound-American Trial Lawyers Foundation, to propose their own set of ethical principles as an alternative to both ABA products. A 1982 revised draft of the document, labeled "The American Lawyer's Code of Conduct," is reproduced at T. MORGAN & R. ROTUNDA, *supra* note 12, at 189-213. According to Theodore I. Koskoff, former president of the American Trial Lawyers Association and co-chair of the Commission, both the Code and Model Rules are unsatisfactory. *Id.* at 190. As to the Model Rules in particular, Mr. Kostoff asserts, "We have rejected one concept that the Kutak Commission apparently espouses, that lawyers have a general duty to do good for society that often overrides their specific duty to serve their clients. Serving clients is the lawyer's basic reason for being a lawyer, and the exceptions to the fundamental rule of absolute loyalty to clients must be minimal, and must be strictly construed." *Id.* at 191.

⁴¹ Gillers, *What We Talked About When We Talked About Ethics: A Critical View of the Model Rules*, 46 OHIO ST. L.J. 243, 245-46 (1985).

⁴² See MODEL RULES Rule 1.6.

caused some difficulty in the adoption process in some states.⁴³ On the whole, however, the Model Rules constitute a vast improvement over the Code. They are more comprehensive, more consistent with contemporary law practice, and better reasoned.

II. KENTUCKY'S PECULIAR NEED FOR THE ADOPTION OF THE MODEL RULES

The adoption of the ABA's Model Rules offers any state presently utilizing the Code considerable improvement in the substance of the law governing lawyer conduct. In Kentucky, however, the adoption would have an even greater favorable impact.

The Kentucky version of the Code is extremely outdated. The Kentucky Supreme Court adopted the Code in 1969.⁴⁴ The

⁴³ In fact, the primary variation among the states adopting the Model Rules has been in Model Rule 1.6's treatment of confidentiality. To date, only Delaware, Missouri and Montana have adopted the ABA's version of the proposed rule. 1 *Law Man. Prof. Conduct* (ABA/BNA) No. 44, at 961 (Sep. 18, 1985) (Delaware); *id.* No. 42, at 924 (Aug. 21, 1985) (Missouri); *id.* No. 39, at 855 (July 10, 1985) (Montana). In addition, the Idaho, Indiana, Louisiana, and New Mexico bar associations have recommended the adoption of the Model Rules' confidentiality provision. 2 *Law Man. Prof. Conduct* (ABA/BNA) No. 2, at 37-38 (Feb. 19, 1986) (Idaho); 1 *Law Man. Prof. Conduct* (ABA/BNA) No. 53, at 1143 (Jan. 22, 1986) (Louisiana); *id.* No. 49, at 1066 (Nov. 27, 1985) (Indiana); *id.* No. 37, at 812 (June 12, 1985) (New Mexico).

The other Model Rules states adopted their own confidentiality rules which permit or require greater disclosure of client confidences under certain circumstances. 2 *Law Man. Prof. Conduct* (ABA/BNA) No. 2, at 37 (Feb. 19, 1986) (Nevada); *id.* No. 1, at 14 (Feb. 5, 1986) (New Hampshire); 1 *Law Man. Prof. Conduct* (ABA/BNA) No. 52, at 1126 (Jan. 8, 1986) (Arkansas); *id.* No. 44, at 962-63 (Sep. 18, 1985) (Washington); *id.* No. 19, at 445-46 (Oct. 3, 1984) (Arizona); *id.* No. 14, at 334 (July 25, 1984) (New Jersey); *id.* No. 10, at 237-38 (May 30, 1984) (Minnesota). Additionally, a number of state bar associations that have recommended adoption of the Model Rules proposed changes to the provision on confidentiality. See 1 *Law Man. Prof. Conduct* (ABA/BNA) No. 53 at 1142-43 (Jan. 22, 1986) (Louisiana and West Virginia); *id.* No. 23, at 534-35 (Nov. 28, 1985) (Maryland); *id.* No. 49, at 1065 (Nov. 27, 1985) (Connecticut); *id.* No. 46, at 1006 (Oct. 16, 1985) (South Carolina); *id.* No. 40, at 881 (July 24, 1985) (Utah); *id.* No. 28, at 630-31 (Feb. 6, 1985) (Wisconsin); *id.* No. 3, at 70 (Feb. 22, 1984) (Michigan). The Kentucky Bar Association's Special Committee studying the Model Rules has also recommended an amended rule on confidentiality providing for greater disclosure of client confidences than that proposed in Model Rule 1.6. See REPORT, *supra* note 5, at 17-24.

There has also been some divergence from the Model Rules' proposed treatment of advertising and solicitation. See, e.g., *id.* No. 44, at 961 (Sep. 18, 1985) (Delaware); *id.* No. 42, at 924 (Aug. 21, 1985) (Missouri).

⁴⁴ KSCR 3.130. See also note 6 *supra* and accompanying text.

ABA, however, amended the Code each year between 1974 and 1980 to reflect developing constitutional doctrine and perceived shortcomings in the original Code.⁴⁵ Nonetheless, in an unpublished 1980 opinion,⁴⁶ the Kentucky Supreme Court announced that the applicable Kentucky law remained the original 1969 Code with none of the ABA-approved amendments.⁴⁷ Thus, generally unbeknownst to the public or the practicing bar, the Kentucky Supreme Court adheres to a version of the Code that the ABA revised in part soon after its adoption and abandoned in total in 1983.⁴⁸ Kentucky, therefore, has more ground to make up than most states to bring its regulation of legal ethics in line with contemporary ABA thinking.

Beyond that, however, Kentucky's adoption of the Model Rules would also help remedy several significant defects in the state's regulation of legal ethics. These defects prevent the present system from fully accomplishing the objectives of the lawyer disciplinary process.

The regulatory process, of course, should control the professional status of those unable or unwilling to abide by a sound

⁴⁵ Many of these amendments were reactions to United States Supreme Court cases regarding first amendment restrictions on lawyer advertising and solicitation. *See, e.g.*, notes 28-29 *supra*; CODE DR 2-101 (publicity) (amended 1978); *id.* DR 2-102 (professional notices, letterheads and offices) (amended 1980); *id.* DR 2-103 (recommendation of professional employment) (amended 1977); *id.* EC 2-2 to EC 2-5 (recognition of legal problems) (amended 1977); *id.* EC 2-7, EC 2-9, EC 2-10, EC 2-11, EC 2-14 (selection of a lawyer) (amended 1977). Other amendments, however, reach matters outside of that realm. *See, e.g.*, CODE DR 3-102 (sharing legal fees with non-lawyers) (amended 1980); *id.* DR 5-105 (conflicts of interest) (amended 1974); *id.* DR 7-102(B) (disclosure of fraud) (amended 1974); *id.* DR 7-110 (contact with officials) (amended 1974); *id.* DR 8-103 (lawyers as judicial candidates) (amended 1974); *id.* EC 7-34 (gifts to judges) (amended 1974).

⁴⁶ *Kentucky Bar Ass'n v. Wilkey*, No. 80-SC-671-KB slip op. (Ky. Dec. 16, 1980). This case is discussed further at Gaetke & Casey, *Kentucky Law Survey—Professional Responsibility*, 70 KY. L. J. 325, 339-40 (1981-82).

⁴⁷ No. 80-SC-671-KB, slip op. at 3-4.

⁴⁸ Since 1984, volume 9 of Baldwin's KENTUCKY REVISED STATUTES ANNOTATED has contained a reproduction of the original 1969 version of the Code. Prior to that time, that version was generally unavailable to practicing lawyers in Kentucky.

Note that the Kentucky Supreme Court has dealt with certain shortcomings of the original Code in light of the developing constitutional case law on advertising and solicitation by adopting its own advertising rule. KSCR 3.135. *See* notes 28-29 *supra*. Similarly, the Court has adopted its own rules on group legal plans, KSCR 3.475, and prepaid legal services, KSCR 3.476.

body of minimal ethical standards. This is accomplished by reprimanding or banishing from the profession individuals who violate those minimal standards. The process, however, should also serve two additional functions. First, it should provide guidance to conscientious members of the profession who seek counsel regarding their ethical responsibilities. Additionally, the process should provide sufficient information to the general public, the ultimate beneficiaries of the regulatory system, to satisfy them that regulation of the legal profession is working fairly and effectively.

Presently two defects in the Kentucky disciplinary process prevent the accomplishment of these two important functions. First, the Kentucky Supreme Court has been almost totally unwilling to adjudicate disciplinary cases under specific disciplinary provisions, basing their decisions instead upon broad, nearly meaningless catch-all provisions.⁴⁹ Second, the Supreme Court persistently uses unduly abbreviated, conclusory opinions, which provide little or no information to the public or to the practicing bar.⁵⁰ The Model Rules' adoption could play a major part in the reformation of these shortcomings.

When adopting the Code as the law applicable in Kentucky, the Court declared that lawyers in this state could be disciplined for violation of the Code and for any "other unprofessional or unethical conduct tending to bring the bench and bar into disrepute."⁵¹ On its face, it seems that such broad language merely serves the useful purpose of filling the inevitable gaps created by any reasonably brief codification of regulatory principles for a complex profession.⁵² The Kentucky Supreme Court, however,

⁴⁹ See notes 51-54 *infra* and accompanying text.

⁵⁰ See note 57 *infra* and accompanying text.

⁵¹ KSCR 3.130.

⁵² The Code, of course, contains its own catch-all language to cover inappropriate conduct not specifically prohibited by the Disciplinary Rules. A lawyer may be disciplined for illegal conduct involving moral turpitude, fraudulent conduct, conduct prejudicial to the administration of justice, and other conduct that indicates a lack of fitness to practice law. CODE DR 1-102(A)(3)-(6). Because Kentucky has adopted the Code, these catch-all provisions are applicable to lawyers practicing in the state.

The additional catch-all language utilized in the Kentucky Supreme Court's rule adopting the Code, however, goes much further than DR 1-102(A). See KSCR 3.130. The Kentucky catch-all language is concerned less with the actual nature of the ethical

prefers to use that broad, catch-all language to dispose of nearly every case of lawyer discipline, whether a specific Code provision applies to the conduct involved or not.⁵³ The result is totally unsatisfactory from a regulatory standpoint. Such an approach results in a *post hoc* form of regulation that provides absolutely no guidance to lawyers looking to the Court's decisions for counsel as to the meaning of the Code. In fact, the approach renders the Code's adoption nearly meaningless because one cannot even look confidently to the Code provisions themselves for assistance with ethical problems.⁵⁴ The adoption of the Model Rules and the simultaneous abandonment of this unfortunate reliance upon vague catch-all language for disposing of disciplinary cases, therefore, would result in substantial improvement in the regulatory process.⁵⁵ Of course, such an improvement will

transgression than with the effect of the conduct upon the bar's public image. Furthermore, the Kentucky language focuses upon the mere tendency of the conduct to affect that image rather than its actual effect. *See id.*

⁵³ Between 1980 and November 1, 1985, only 4 of 32 reported lawyer disciplinary cases even refer to Disciplinary Rules or Ethical Considerations. *See* Kentucky Bar Ass'n v. Fitzgerald, 652 S.W.2d 77 (Ky. 1983); Kentucky Bar Ass'n v. Tiller, 641 S.W.2d 421 (Ky. 1982); Kentucky Bar Ass'n v. Gangwish, 618 S.W.2d 176 (Ky. 1981); Kentucky Bar Ass'n v. Heleringer, 602 S.W.2d 165 (Ky. 1980), *cert. denied*, 449 U.S. 1101 (1981). The most glaring recent example of this deficiency in the Court's treatment of lawyer disciplinary cases is the unpublished opinion in Kentucky Bar Ass'n v. Smith, No. 83-SC-144-KB (Ky. July 5, 1984), *cert. denied*, 105 S. Ct 514 (1984). The Court's failure to utilize the applicable Code provisions in *Smith* is soundly criticized in Van Booven, *Kentucky Law Survey—Professional Responsibility*, 73 Ky. L.J. 449, 454-58 (1984-85).

⁵⁴ It is possible that the court might consider certain conduct implicitly authorized by the Code to be unprofessional or unethical conduct tending to bring the bench and bar into disrepute. This is particularly true when pre-Code case law using the same catch-all standard is more stringent than the Code's treatment of identical conduct. The Author has urged this point in detail using the field of solicitation as an example. *See* Gaetke, *Solicitation and the Uncertain Status of the Code of Professional Responsibility in Kentucky*, 70 Ky. L.J. 707, 709-13, 722-24 (1981-82).

⁵⁵ Compared to the Code, the Model Rules pare down the use of catch-all language substantially. *Compare* CODE DR 1-102(A)(3)-(6) with MODEL RULES Rule 8.4(b)-(d). However, the catch-all language used by the Kentucky Court is far broader than that employed by the Code. *See* notes 52-54 *supra*. Adoption of the Model Rules in Kentucky, therefore, would undoubtedly result in an even greater reduction in the potential for reliance upon such vague, catch-all provisions.

Some states have expressed reluctance to adopt the new Model Rules because it would require the abandonment of extensive case law interpreting the Code provisions. *See, e.g.,* 1 *Law. Man. Prof. Conduct*, *supra* note 3, No. 48, at 1047-48 (Nov. 13, 1935) (Oregon). There is some evidence that similar sentiments exist within the Kentucky Bar Association. Address by Michael M. Hooper, Assistant Director, Kentucky Bar Associ-

be realized only if the Court also commits itself to careful application and construction of the Model Rules' specific provisions.⁵⁶ Their adoption, however, would be a large step in the right direction.

The second defect in Kentucky's regulation of lawyers' ethics, the frequent use of conclusory, uninformative opinions in disciplinary cases,⁵⁷ creates two possible, divergent implications. One, likely to occur to anxious lawyers reviewing such decisions, is that the Court dispenses discipline in an arbitrary fashion without regard for public accountability. The other, more likely to be felt by the general public, is that lawyer discipline is dispensed in a club atmosphere where courtesy to members prohibits the public discussion of indiscretions. One can only hope that both implications are erroneous, but who can be certain in the face of the current judicial practice? Surely the

ation, to Professional Responsibility Class, University of Kentucky College of Law (October 18, 1984). It seems, however, that the one advantage Kentucky has from its historical use of vague, catch-all language is the relative lack of such case law to abandon.

⁵⁶ In its unpublished opinion in *Kentucky Bar Ass'n v. Wilkey*, No. 80-SC-671-KB, the Court did urge the bar association to state its charges in future disciplinary cases in reference to precise Code provisions rather than the catch-all language of KSCR 3.130. No. 80-SC-671-KB, slip op. at 3. The Court's opinions since then, however, do not evidence any greater usage of Code language by the Court. See note 53 *supra*; Van Booven, *supra* note 53, at 449-50.

⁵⁷ See, e.g., *Kentucky Bar Ass'n v. Regan*, 692 S.W.2d 632 (Ky. 1985); *Kentucky Bar Ass'n v. Brutscher*, 678 S.W.2d 788 (Ky. 1984); *Kentucky Bar Ass'n v. Reed*, 675 S.W.2d 2 (Ky. 1984); *Kentucky Bar Ass'n v. Gregory*, 659 S.W.2d 204 (Ky. 1983). This characteristic has been noted by the Author in Gaetke & Casey, *supra* note 46, at 326 n.6, and has been reiterated by another commentator. See Van Booven, *supra* note 53, at 449-50.

Indeed, an additional criticism might be offered. The Court also seems unduly predisposed to issue the most important disciplinary decisions in unpublished form. For example, in *Kentucky Bar Ass'n v. Smith*, No. 83-SC-144-KB, the Court addressed the pervasive problem of conflicts of interest arising out of lawyers' business transactions with clients and simultaneous representation of clients with potentially adverse interests. *Id.* See Van Booven, *supra* note 53, at 454-58. Despite the importance of the Court's views regarding such practices, the Court chose to present them only in an unpublished opinion. Similarly, in *Kentucky Bar Ass'n v. Wilkey*, No. 80-SC-671-KB, the Court announced that it applied only the 1969 version of the Code with none of the ABA's numerous amendments since that time. *Id.*, slip op. at 3-4. See also notes 46, 56 *supra*. Although critically important to the practicing bar, the opinion was not published. It seems that the Court's use of unpublished opinions for some of the most important decisions and its publication of brief, summary opinions, is doubly unproductive. For a criticism of the practice of issuing unpublished opinions, see Render, *On Unpublished Opinions*, 73 Ky. L.J. 145 (1984-85).

Court must recognize that the regulated parties, here lawyers, need to know what conduct has resulted in discipline. Likewise, the public needs to know the facts surrounding disciplinary cases to be assured that the Court is doing a fair and effective job of enforcing the profession's norms. The Court's adoption of the Model Rules would not necessarily accomplish these essentials of the regulatory process. To the extent adoption compelled the Court to describe carefully the conduct involved and to apply and construe the new provisions, however, the opinions would undoubtedly be more informative and better serve the objectives of the regulatory process.

Rectifying these shortcomings would require the unequivocal, public adoption of a body of sound substantive law and its careful application and construction in published opinions that adequately describe the conduct at issue. Adoption of the Model Rules could be the first step in such a reformation of legal ethics regulation in Kentucky.

CONCLUSION

Kentucky, along with the other states currently using the Code, has the opportunity to improve considerably the regulation of legal ethics by adopting the ABA's proposed Model Rules. The Model Rules, while subject to legitimate criticism, constitute a substantial improvement upon the Code both in form and substance.

More is to be gained by adopting the Model Rules in Kentucky, however, than in the other Code states. Adoption should signal the end of the Kentucky Supreme Court's persistent reliance upon vague catch-all language rather than precise regulatory provisions in disciplining lawyers. The Model Rules' adoption in Kentucky could also serve as the impetus to abandon the regular issuance of conclusory opinions offering no guidance to the bar or public as to the conduct involved.

While the adoption of the Model Rules would go far in remedying the defects in Kentucky's present regulation of legal ethics, it would surely not be enough. The Kentucky Supreme Court must make a new commitment to the task. This is not to say that the Court has been insincere in its efforts to date. By most appearances, in fact, the contrary is true. In an area as

critical to the public and to the public esteem of the bar, however, more is needed than sincerity and good intentions. A genuine commitment to the establishment of a sound regulatory program for lawyers is needed. The public expects it. Lawyers, of all people, should demand it.